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BEFORE THE ARIZONA CORPORATION COMMISSION

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BOB STUMP - Chairman  
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BOB BURNS  
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IN THE MATTER OF THE APPLICATION OF  
MONTEZUMA RIMROCK WATER COMPANY,  
LLC FOR APPROVAL OF FINANCING TO  
INSTALL A WATER LINE FROM THE WELL  
ON TIEMAN TO WELL NO. 1 ON TOWERS.

DOCKET NO. W-04254A-12-0204

IN THE MATTER OF THE APPLICATION OF  
MONTEZUMA RIMROCK WATER COMPANY,  
LLC FOR APPROVAL OF FINANCING TO  
PURCHASE THE WELL NO. 4 SITE AND THE  
COMPANY VEHICLE.

DOCKET NO. W-04254A-12-0205

IN THE MATTER OF THE APPLICATION OF  
MONTEZUMA RIMROCK WATER COMPANY,  
LLC FOR APPROVAL OF FINANCING FOR AN  
8,000-GALLON HYDRO-PNEUMATIC TANK.

DOCKET NO. W-04254A-12-0206

IN THE MATTER OF THE RATE APPLICATION  
OF MONTEZUMA RIMROCK WATER  
COMPANY, LLC.

DOCKET NO. W-04254A-12-0207

JOHN E. DOUGHERTY,  
  
COMPLAINANT,  
  
V.

DOCKET NO. W-04254A-11-0323

MONTEZUMA RIMROCK WATER COMPANY,  
LLC,  
  
RESPONDENT.

IN THE MATTER OF THE APPLICATION OF  
MONTEZUMA RIMROCK WATER COMPANY,  
LLC FOR APPROVAL OF A RATE INCREASE.

DOCKET NO. W-04254A-08-0361

IN THE MATTER OF THE APPLICATION OF  
MONTEZUMA RIMROCK WATER COMPANY,  
LLC FOR APPROVAL OF A FINANCING  
APPLICATION.

DOCKET NO. W-04254A-08-0362

**NOTICE OF FILING  
STAFF'S SUPPLEMENTAL  
REPLY BRIEF**

...

1 **I. INTRODUCTION**

2 On August 30, 2013, Staff filed its Opening Brief in the above captioned consolidated matter.  
3 On September 20, 2013, Staff filed its Reply. In the Reply, Staff noted that Mr. Dougherty's initial  
4 brief failed to discuss any issues other than the three Administrative Law Judge ("ALJ") questions.  
5 On that basis, Staff indicated that in the event Mr. Dougherty filed a reply brief that addressed  
6 matters that were not included in his initial brief, Staff might file a response brief. As further noted in  
7 Staff's September 20 Reply filing, Staff fully intended that its Opening Brief reflect Staff's position  
8 on all issues presented in this matter. Consequently, Staff will confine its comments regarding Mr.  
9 Dougherty's Reply Brief to responding to arguments Mr. Dougherty has raised in his August 20  
10 Reply Brief that were not already addressed in Staff's Opening Brief.<sup>1</sup>

11 Staff would further note an issue with Mr. Dougherty's September 26, 2013 filing of  
12 Corrections to Reply Brief of Intervenor/Complainant John E. Dougherty. Attached to the filing is a  
13 document report discussing the fit and proper analysis from a securities perspective. Staff objects to  
14 the consideration of the attachment as part of the evidentiary record in this matter because it is a late  
15 filed exhibit and Staff has not had an opportunity to cross examine any witness regarding it or present  
16 testimony to contravene it.

17 **II. DISCUSSION**

18 On Reply, Mr. Dougherty has criticized Staff's analysis of the three ALJ questions, Staff's  
19 analysis of the complaint, Staff's rate case recommendations and Staff's "paternalistic protection of  
20 MRWC." As Staff stated within its August 20 Reply, Mr. Dougherty's analysis of the three ALJ  
21 questions is unpersuasive and Staff continues to assert that its analysis of the three ALJ questions  
22 provided within Staff's Opening Brief is more soundly reasoned. Staff will confine its response to  
23 the matters of Mr. Dougherty's criticisms of Staff's analysis of the complaint, the rate case, and the  
24 assertion of paternalism by Staff – none of which were addressed in Mr. Dougherty's initial brief.

25 ...

26 \_\_\_\_\_  
27 <sup>1</sup> Staff acknowledges that no provision was made for supplemental briefing. Staff's filing is extraordinary and owing  
28 solely to Mr. Dougherty's choice to file a concatenated initial brief and then file a comprehensive brief only upon reply  
which, regardless of intent, has the effect of preventing parties from responding fully in response. In the event that Staff's  
supplemental brief is not accepted, Staff alternatively joins in the Company's assertion that Mr. Dougherty has waived the  
ability to argue the issues that he failed to assert in his initial brief.

1           **A.     Staff's Rate Case Recommendations**

2           Mr. Dougherty hinges his response to Staff's rate case recommendations on the notion that the  
3 Company's alleged state of noncompliance prevents Commission approval of the Company's debts  
4 retroactively.<sup>2</sup> As was made clear by Mr. Dougherty's testimony at hearing, Mr. Dougherty would  
5 prefer the Company remain in noncompliance (even if it means ratepayers are prevented from  
6 receiving safe drinking water)<sup>3</sup> so as to prevent it from being able to be made whole. Mr. Dougherty  
7 reiterates this position in his Reply by stating that if his request is granted, "the Company will remain  
8 in noncompliance with Commission regulations and state statutes, and therefore MRWC's request for  
9 a rate increase and approval of financing applications in this consolidated docket should be denied."<sup>4</sup>

10          At the outset, Staff asserts that withholding financing approval solely to leverage the  
11 Company into a position of financial jeopardy is inappropriate. Rather, Staff's obligation is to  
12 provide recommendations that balance the interests between ratepayers and the rate-regulated utility.  
13 Adopting Mr. Dougherty's recommendation would be directly at odds with the public interest.

14          The ratepayer is best served by having a utility capable of providing them with safe, reliable  
15 drinking water service at reasonable rates. The quality of water service has improved since MRWC  
16 acquired the system from MEPOA. Further, the rates should permit the Company to recover its  
17 original investment and an appropriate return on that investment in plant that is necessary for the  
18 provision of that service to the public. Staff has concluded that the facilities to be funded with the  
19 debt that is the subject of the financing requests is reasonably necessary for the utility to provide safe  
20 drinking water service to its ratepayers. Depriving ratepayers of adequate service is in effect a  
21 disservice to the ratepayers.

22          Moreover, Mr. Dougherty has supplied no authority contravening Staff's assertion that the  
23 Commission is able to grant retroactive approval of debt. Mr. Dougherty's analysis of the issue  
24 continues to return to the statutes A.R.S. §§ 40-301 and -302. Unfortunately, Mr. Dougherty's  
25 analysis is flawed. "When a state statute conflicts with Arizona's Constitution, the constitution must  
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27 <sup>2</sup> Dougherty Reply Br. at 14.

28 <sup>3</sup> See, e.g., tr. at 809 (Testimony by Mr. Dougherty indicating his preference that the Company be bound to comply with a  
procedural order and to not install arsenic treatment facilities necessary to provide safe drinking water to ratepayers).

<sup>4</sup> Dougherty Reply Br. at 15.

1 prevail.” *Dobson v. State ex rel. Comm’n on Appellate Court Appointments*, CV-13-0225-SA, 2013  
2 WL 5051457 (Ariz. Sept. 13, 2013). The Commission has plenary authority to set utility rates and  
3 that authority extends to all “necessary steps” in the ratemaking process, including the approval of  
4 debt to be included in a utility’s capital structure. *See Arizona Corp. Comm’n v. State ex. rel. Woods*,  
5 171 Ariz. 286, 830 P.2d 807 (1992). Any reading of A.R.S. §§ 40-301 and -302 that suggests that the  
6 Commission cannot take appropriate actions concerning utility debt would curb the Commission’s  
7 authority to undertake necessary steps in the rate setting process and thus render the statutes  
8 unconstitutional.

9       Legislation may only *increase* the Commission’s constitutional ratemaking power, it may not  
10 limit that power. *See, e.g., Garvey v. Trew*, 64 Ariz. 342, 347, 170 P.2d 845, 848 (1946) stating “The  
11 legislature may enlarge [the Commission’s] powers and extend its duties but may not decrease its  
12 powers.” *See also, State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 299-300, 138 P. 781,  
13 783 (1914) stating, “By it ‘the lawmaking power may enlarge the powers and extend the duties of the  
14 Corporation Commission,’ but *nowhere in that instrument is the Legislature empowered to restrict*  
15 *or limit its powers ....*” (emphasis added).

16       Mr. Dougherty’s analysis of the statutes is inconsistent with a basic cornerstone of statutory  
17 and constitutional interpretation and is clearly wrong. The Commission has the authority to grant  
18 retroactive approval and determine that the facilities that are supported by the requested debt are  
19 reasonably necessary for the provision of safe reliable and adequate utility service. There is no  
20 reason not to grant the retroactive approval of the debt that Staff recommends.

21       With respect to the apparently forged leases, Mr. Dougherty has failed to establish how those  
22 documents have a bearing on the leases for which MRWC is seeking financing approval. Mr.  
23 Dougherty implies that any wrongdoing associated with the allegedly forged leases attaches to the  
24 other documents.<sup>5</sup> However, Mr. Dougherty has not supplied any evidence, substantial or otherwise  
25 demonstrating who *is* responsible for having produced the alleged forgeries.<sup>6</sup> When considered in  
26

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27 <sup>5</sup> *See* Dougherty Reply Br. at 8, suggesting a connection between the purportedly forged leases and the true and proper  
leases that were supplied for purposes of obtaining retroactive approval.

28 <sup>6</sup> *See, e.g.,* tr. at 861 (exchange between Mr. Dougherty and Judge Harpring wherein Mr. Dougherty concedes that he has  
not proven who is responsible for producing the alleged forgeries.)

1 conjunction with the fact that the Company is not seeking any approvals related to the alleged forged  
2 leases, it is clear that (1) Mr. Dougherty's legal analysis of the Commission's authority to grant  
3 retroactive financing approvals is incorrect, (2) Mr. Dougherty has not established a reasonable basis  
4 to prevent the retroactive approval of the requested leases, and (3) he has failed to meet his  
5 evidentiary burdens for any claims related to the allegedly forged leases.

6 **B. Staff's Complaint Analysis**

7 **1. Mr. Dougherty Fails to Establish an Injury-in-Fact**

8 Mr. Dougherty suggests surprise that Staff has asserted he lacks standing to pursue any claims  
9 based on the Commission's rate or financing approvals.<sup>7</sup> Staff has never made a secret that Mr.  
10 Dougherty's complaint suffers from the fact that he is not a ratepayer and consequently cannot have  
11 suffered any harm from many of the matters raised within his complaint. Staff noted this deficiency  
12 several times informally and on the record as early as the October 25, 2011 procedural conference  
13 held in the Complaint Proceeding, when Staff gave a preliminary evaluation of Mr. Dougherty's  
14 complaint allegations.<sup>8</sup>

15 Mr. Dougherty likewise points to A.R.S. § 40-246 for the proposition that any person may file  
16 a complaint. Staff agrees. Unfortunately, the ability to file a complaint is not the issue. Standing is  
17 not merely a matter of being able to "get a foot in the door" but also the ability to demonstrate that  
18 there is some injurious situation that requires resolution and that the tribunal can provide some  
19 resolution for it.<sup>9</sup> Lack of an injury-in-fact saps the merit out of Mr. Dougherty's rate and financing  
20 related *claims* at the outset.

21 Moreover, the hypothetical possibility that Mr. Dougherty may become a ratepayer of  
22 MRWC<sup>10</sup> is insufficient to establish he has suffered any harm from the rate and financing related  
23 claims he has alleged. Mr. Dougherty might be able to assert an injury-in-fact were he a ratepayer of  
24

25 \_\_\_\_\_  
<sup>7</sup> Dougherty Reply Br. at 10.

26 <sup>8</sup> See, e.g., tr. of October 25, 2011 Procedural Conference at 50.

27 <sup>9</sup> "[T]he plaintiff must have suffered an 'injury-in-fact'-an invasion of a legally protected interest that is (a) concrete and  
28 particularized, and (b) actual or imminent, not conjectural or hypothetical. Second there must be a causal connection  
between the injury and the conduct complained of....Third, it must be likely, as opposed to merely speculative, that the  
injury will be redressed by a favorable decision." *United States v. Hayes*, 515 U.S. 737, 743 (1995).

<sup>10</sup> See, tr. at 84. Mr. Dougherty again raises this hypothetical in his Reply Brief at 11.

1 the Company. The mere possibility that he *could* become a ratepayer of MRWC is insufficient to  
2 establish a stake in the rates and financings of the Company.<sup>11</sup>

3 Finally, it is unclear that a decision in this matter will provide any resolution to the matters at  
4 the root of his complaint. Mr. Dougherty asserts that,

5 Only if MRWC stipulates that it will immediately dispose of Well No. 4 and will  
6 never seek permission from the Commission to include it in the rate base, would the  
7 Company's claim that property is not used or useful and necessary would have merit.  
[sic] Intervenor/Complainant would welcome such a stipulation and withdraw from  
any further intervention with MRWC.<sup>12</sup>

8 Mr. Dougherty's concerns related to Well No. 4 are not ripe for the kind of final disposition  
9 he is seeking. Staff has concluded that the well is not presently used and useful because it is not  
10 connected to the system.<sup>13</sup> Likewise, the Company has agreed with Staff's conclusion. As such, the  
11 Company is no longer requesting rate recovery for debts associated with construction of Well No. 4  
12 as part of the current application. Consequently, the matter is not postured for relief based on the  
13 complaint.

## 14 2. Complaint Counts

15 In Staff's Opening Brief, Staff provided its analysis of the complaint allegations that Mr.  
16 Dougherty raised as of the conclusion of the evidentiary hearing. In his initial brief, Mr. Dougherty  
17 did not speak to any of the complaint counts and upon reply, Mr. Dougherty only discusses two of the  
18 complaint counts. As such, Staff assumes that Mr. Dougherty is waiving all but the two counts still  
19 being raised within his reply. To the extent that Mr. Dougherty is still raising the remaining  
20 allegations, Staff relies on the discussion of those counts within its Opening Brief.

### 21 a. Count I

22 With respect to Count I, Mr. Dougherty again fails to establish how the Company violated  
23 A.A.C. R14-2-411(D)(1) or (2) given the facts relating to the allegation. Staff did not rely upon the  
24 accuracy of the utility annual reports for purposes of processing the financing or rate application.<sup>14</sup>  
25 Mr. Dougherty attempts to suggest that this claim is really about not meeting NARUC standards.

26  
27 <sup>11</sup> *Hayes*, 515 U.S. at 743.

<sup>12</sup> Dougherty Reply Br. at 22.

28 <sup>13</sup> Becker Dir. Test., Ex. S-1 at 17.

<sup>14</sup> Tr. at 877-80.

1 The only testimony on the subject of what would qualify as NARUC compliant bookkeeping  
2 suggested that the Company's records are acceptable if not strictly conforming to standard.<sup>15</sup>

3 Mr. Dougherty asserts a generalized interest of the public in the accuracy of the annual reports  
4 filed by the Company. "Staff also ignores the fact that the Annual Reports are the only way  
5 ratepayers and the public can review the operations of a monopoly utility that is granted a CC&N by  
6 the Commission."<sup>16</sup> Staff recognizes that the public has an interest in the accuracy of documents filed  
7 with the Commission. The issue, however, is the *materiality* of the asserted inaccuracy which Mr.  
8 Dougherty noted when he originally expressed the allegation within his complaint.<sup>17</sup>

9 As Staff explained in its Opening Brief, materiality is a question of whether the matter is  
10 important to the outcome.<sup>18</sup> The outcome Mr. Dougherty is seeking to demonstrate is that the  
11 Company violated obligations to maintain its records properly and utilize NARUC accounting  
12 standards pursuant to A.A.C. R14-2-411(D)(1) and (2). The evidence produced at hearing clearly  
13 shows that the inaccuracy of the annual reports did not in the slightest affect the analysis of the  
14 Company's records. Staff did not rely on the unaudited annual reports and instead went directly to  
15 the source documents which are naturally the most accurate source of information possible. Mr.  
16 Dougherty likewise made use of discovery requests and subpoenas to obtain direct source  
17 information.

18 Because the annual reports are unaudited "snapshots" of a utility's condition, they would not  
19 alone be sufficient to demonstrate the accuracy of the financial information stated within them. In  
20 other words, the inaccuracy of the annual reports, without something more would be insufficient to  
21 demonstrate that a utility was not maintaining its books properly. Staff performed a review and  
22 found that the utility's bookkeeping, while needing improvement, was adequate to reliably establish  
23 the state of the utility's finances. Mr. Dougherty has consequently failed to meet his burden to  
24  
25

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26 <sup>15</sup> *Id.* at 1060-61.

27 <sup>16</sup> Dougherty Reply Br. at 12.

28 <sup>17</sup> *See*, Complaint filed in Docket No. W-04254A-11-0323 on August 23, 2011 at page 3, paragraph (I).

<sup>18</sup> *See, e.g.* Black's Law Dictionary defining "Material" as "Important; more or less necessary; having influence or effect; going to the merits; having to do with the matter as distinguished from form." Black's Law Dictionary, 880 (5th ed. 1979).

1 demonstrate that the Company has violated its bookkeeping obligations under A.A.C. R14-2-  
2 411(D)(1) and (2).

3 Further, the evidence provided at hearing supports a conclusion that the inaccuracy of the  
4 annual reports was unintentional. Ms. Olsen and her accountant Mr. Campbell made it evident that  
5 they are not regulatory accountants and the nuances of NARUC bookkeeping and regulatory  
6 accounting are not within their general knowledge.<sup>19</sup> The appropriate remedy for the inaccuracy of  
7 the reporting given these circumstances is to advise the Company that it is required to maintain its  
8 records appropriately and educate Company personnel as to what the requirements are relating to  
9 approvals of long-term debt and reporting it on annual reports. Staff has made such a  
10 recommendation.<sup>20</sup>

11 **b. Count XVII**

12 Mr. Dougherty has likewise failed to establish that he is entitled to relief in relation to the  
13 allegations that the Company violated A.R.S. §§ 40-301, -302, -424 and -425. The Commission has  
14 the authority to provide retroactive approval for debt already incurred by a utility if it is necessary for  
15 appropriate ratemaking. Therefore, until the Commission determines that it will not provide such  
16 approval, it is premature to reach a conclusion that the Company has violated A.R.S. §§ 40-301 and -  
17 302.

18 Finally, Mr. Dougherty places undo importance on A.R.S. § 40-303(C)(2) and (3) for the  
19 proposition that the Company, and its attorney, have committed a felony misrepresentation that  
20 influenced the Commission to issue an order authorizing the issuance of any stock, bond, note or  
21 other evidence of indebtedness.<sup>21</sup> Mr. Dougherty's reliance on that securities provision is misplaced  
22 because the statute is aimed at future issuance of such instruments. Mr. Dougherty's complaint is  
23 that the debt has already been incurred. As such, A.R.S. § 40-303 is inapplicable as its plain  
24 language illustrates that it aims at knowing misrepresentations made to obtain prior approval from the  
25 Commission as a precursor to issuing said instruments. Moreover, A.R.S. § 40-303 is inapplicable as  
26 the allegedly forged leases that were submitted are not the leases for which the Company is seeking

27 <sup>19</sup> See, e.g., tr. at 563-564; see also Exhibit A-1 Resumé of Patricia Olsen.

28 <sup>20</sup> Becker Direct Test., Ex. S-1 at 26.

<sup>21</sup> Dougherty Reply Br. at 13-14.



1 approval. The record is clear that the leases for which MRWC is actually seeking approval are  
2 legitimate. Consequently, Mr. Dougherty has failed to establish entitlement to any relief pursuant to  
3 the allegations asserted in Count XVII.

4 **C. Staff "Paternalism"**

5 Mr. Dougherty concludes his discussion of the Staff position with a broad policy argument  
6 regarding what he describes as Staff's paternalistic recommendations regarding the Company.<sup>22</sup>  
7 What Mr. Dougherty deems to be paternalism, Staff asserts constitutes reasonable balancing of utility  
8 and ratepayer interests. Mr. Dougherty attributes to Staff a disregard for "mere" paperwork  
9 compliance.<sup>23</sup> Rather, the evidence in this proceeding has made it clear that the interest in getting  
10 safe, arsenic-free water to consumers is a more immediate and substantial concern than bringing  
11 paperwork into strict conformity with accounting requirements. Significantly, ratepayers and the  
12 Company have an *identical* interest in achieving arsenic compliance. This lends itself to Staff's  
13 recommendation to concentrate on the health and safety compliance prior to paperwork compliance.

14 Staff acknowledges that paperwork compliance is important. However, the importance of  
15 paperwork compliance must be considered in context. It would appear that when utilities are not  
16 meeting various agencies' approval processes, the paperwork noncompliance could be useful as an  
17 indicator of deeper problems such as unresponsiveness to *any* regulation. A utility that is ignoring all  
18 or most regulation is likely a hazard to consumers. This is particularly true when those regulations  
19 relate to health and safety and the commodity the utility provides is one that is necessary for life.

20 The present circumstances do not fit that scenario. The evidence provided in this matter  
21 shows that MRWC's paperwork noncompliance has come about due to the urgency of meeting health  
22 and safety requirements.<sup>24</sup> Consequently, Staff continues to believe that the appropriate result is to  
23 allow the Company to concentrate on complying with the health and safety requirements and work  
24 toward paperwork compliance as it becomes able.

25 Mr. Dougherty's interest in pursuing paperwork compliance over health and safety  
26 compliance is directly contrary to not just the Company's interest but the ratepayer's interest as well.

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27 <sup>22</sup> *Id.* at 15-16.

28 <sup>23</sup> *Id.* at 15.

<sup>24</sup> Tr. at 339, 358-59.

1 At hearing, Mr. Dougherty confirmed that in this regard he would prefer to see the Company  
2 prioritize paperwork compliance even if that means that the ratepayers must continue to be served  
3 arsenic contaminated water.

4 By Mr. Wiley:

5 Q. Would you rather have the company comply with procedural orders and not install an  
6 arsenic treatment facility?

7 By Mr. Dougherty:

8 A. Absolutely.<sup>25</sup>

9 Likewise, Mr. Dougherty has unequivocally asserted his belief that ratepayers are best served by  
10 pursuing paperwork compliance to the point of financially crippling their utility service provider.

11 By Mr. Van Cleve:

12 Q. If the Commission ultimately denies the financing application of the water company  
13 how does that benefit the customers?

14 By Mr. Dougherty:

15 A. It benefits the customers because the end result, the end result of denying those  
16 financing applications would require the company to come up with another financing  
17 plan that is approved properly, and not within the context of the rate case. Because  
18 what the Commission is doing is shifting this from the docket that we were in to the  
19 rate case docket. All right? Ultimately denial of the two leases, as the company said in  
20 direct testimony, would financially cripple the company. And that could force the sale  
of the company, one level. The company would possibly sell it. But on a higher level,  
given the scale of the violation, I believe that by rejecting the financing applications  
for the [Arsenic Treatment Facility] and the building, we would lead to, and a  
simultaneous recommendation or referral to the Attorney General's Office on a 303.C  
violation, could lead to the removal of the management of this company.<sup>26</sup>

21 Staff would submit that driving utilities that are ratepayers' sole source for drinking water into a state  
22 of financial collapse is not consistent with the public interest or ratepayer interest. Similarly, denying  
23 ratepayers safe drinking water solely to provide a nonratepayer with a fact pattern to support an  
24 alleged legal claim is not in the ratepayers' interest. Staff's recommendations are made, not out of  
25 paternalism, but instead are based on a concern for the public interest. Therefore, Mr. Dougherty's  
26 criticisms of Staff "paternalism" are meritless.

27  
28 <sup>25</sup> *Id.* at 809.

<sup>26</sup> *Id.* at 846.

1 **III. CONCLUSION**

2 Based upon the evidentiary record and for all the above stated reasons and those stated in  
3 Staff's Opening Brief docketed on August 30, Staff recommends adoption of its recommendations in  
4 this consolidated matter.

5 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of October, 2013.

6  

7  
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11 Original and thirteen (13) copies  
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13 4<sup>th</sup> day of October, 2013, with:

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16 Copy of the foregoing emailed this  
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